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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 761

5 DAVONTE GARCIA,

6 Defendant.

7 -----x

New York, N.Y.  
August 31, 2020  
9:00 a.m.

10 Before:

11 HON. J. PAUL OETKEN

District Judge

12  
13 APPEARANCES

14 AUDREY STRAUSS

Acting United States Attorney for the  
Southern District of New York

15 BY: FRANK BALSAMELLO

16 Assistant United States Attorney

17 JAMES BRANDEN

Attorney for Defendant

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1 (By video conference)

2 THE COURT: Good morning, folks. Can you all hear me?  
3 Mr. Brandon, can you hear me?

4 MR. BRANDEN: I can, Judge. Good morning.

5 THE COURT: Good morning. Mr. Balsamello, can you  
6 hear me?

7 MR. BALSAMELLO: Yes. Good morning.

8 THE COURT: Good morning.

9 Mr. Garcia, can you hear me?

10 THE DEFENDANT: Yes, I can. Good morning.

11 THE COURT: Good morning.

12 And, Mr. Hampton, can you hear me?

13 DEPUTY COURT CLERK: I can hear you. I was  
14 disconnected. I am now reconnected but only with audio, which  
15 is fine.

16 THE COURT: OK. You can go ahead and call the case,  
17 and we'll start.

18 (Case called)

19 MR. BALSAMELLO: Good morning, your Honor. Frank  
20 Balsamello for the United States.

21 MR. BRANDEN: Good morning, Judge. Jim Brandon for  
22 Mr. Garcia, who is present by video.

23 THE COURT: Good morning. Is there a probation  
24 officer on as well?

25 MS. GARCIA: Yes, good morning, your Honor, Sandra

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1 Velez Garcia, U.S. Probation officer.

2 THE COURT: Good morning. And I have confirmed that  
3 Mr. Garcia can hear and that the court reporter can hear and is  
4 taking this down.

5 We'll start with the arraignment on the superseding  
6 indictment, which was filed on July 21. Let me just ask Mr.  
7 Balsamello that you can just confirm that there are no changes  
8 in the counts that name Mr. Davonte Garcia.

9 MR. BALSAMELLO: That's correct, from the S2 to the S3  
10 the only change is that one additional defendant was added  
11 Brandon Gill, otherwise there were no changes between the S2  
12 and the S3.

13 THE COURT: OK. And, Mr. Garcia, have you had a  
14 chance to see a copy of the latest version of the indictment  
15 S3?

16 THE DEFENDANT: Yes.

17 THE COURT: And you have a right for me to read the  
18 indictment publicly, or you can waive that right. Do you waive  
19 public reading of it at this time?

20 THE DEFENDANT: Yes.

21 THE COURT: And do you understand the charges against  
22 you?

23 THE DEFENDANT: Yes.

24 THE COURT: And normally in an arraignment I would ask  
25 you how you wish to plead and you would either plead guilty or

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1 not guilty. I understand that you have reached an agreement by  
2 which you will plead guilty; is that correct?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: OK. And, Mr. Branden, I have been  
5 informed that your client wishes to plead guilty and he has  
6 indicated that pursuant to the plea agreement. Have you had a  
7 chance to review the plea agreement and have you gone over it  
8 with him?

9 MR. BRANDEN: I have, Judge. And he has had a chance  
10 to review the plea agreement that's dated July 13, 2020.

11 THE COURT: OK. I want to start with the preliminary  
12 matter. We're obviously doing this remotely in light of the  
13 COVID-19 pandemic. We are conducting this conference by video,  
14 doing that as authorized by the CARES Act and by Chief Judge  
15 McMahon's standing order and finding that plea proceedings  
16 cannot be conducted in person without seriously jeopardizing  
17 public health and safety as long as the defendant consents.  
18 Mr. Branden, have you discussed the subject of proceeding  
19 remotely by video with Mr. Garcia?

20 MR. BRANDEN: Yes, I have.

21 THE COURT: And, Mr. Garcia, have you had a chance to  
22 talk to your lawyer about the possibility of proceeding  
23 remotely as opposed to waiting when we can do it in person?

24 THE DEFENDANT: Yes, I have.

25 THE COURT: And do you waive your right to do this in

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1 person and have your case proceeding by video?

2 THE DEFENDANT: Yes, I do.

3 THE COURT: All right. I find the defendant has  
4 consulted with counsel and has voluntarily and knowingly waived  
5 his right to an in-person proceeding for purposes of this plea  
6 proceeding.

7 I also must make a finding as to whether this  
8 proceeding can or cannot be further delayed without serious  
9 harm to the interests of justice. And if there is anything  
10 counsel would like to say about the interest in doing this  
11 promptly as opposed to waiting and the harm to justice that  
12 would be called from waiting further, either one of you can  
13 start.

14 MR. BRANDEN: I will just say on behalf of Mr. Garcia  
15 that it is in his best interests to resolve the matter and be  
16 moved into a BOP facility, to be moved out of the MCC as soon  
17 as possible. The conditions are wretched and he is pretty  
18 miserable there.

19 THE COURT: OK. Anything you would like to add, Mr.  
20 Balsamello?

21 MR. BALSAMELLO: I will just add, your Honor, that the  
22 government has a number of cooperating witnesses in the case,  
23 at least some of whom we anticipate may seek time served  
24 sentences when eventually their cases are resolved, which  
25 cannot happen until the rest of the defendants charged have

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1 their cases resolved, so proceeding today and with other  
2 defendants' pleas in the case as well will allow us to move  
3 ahead with cooperating witness sentencings when that time  
4 comes.

5 THE COURT: OK. For the reasons given by counsel --  
6 which I agree with -- I do find that this proceeding cannot be  
7 delayed further without serious harm to the interests of  
8 justice, and that this video conference is authorized and  
9 appropriate at this time.

10 Mr. Garcia, I have been informed that you wish to  
11 plead guilty to conspiracy to distribute and possess with  
12 intent to distribute narcotics. Is that right?

13 THE DEFENDANT: Correct.

14 THE COURT: And before accepting your plea, I'm going  
15 to ask you certain questions so that I can satisfy myself that  
16 you wish to plead guilty because you are guilty and not for  
17 some other reason. If you do not understand any of my  
18 questions, or if you would like a further opportunity to talk  
19 to your lawyer, please let me know.

20 MR. BALSAMELLO: Your Honor, may I just interject this  
21 might be a technical issue only occurring on my connection  
22 here, but I just lost your video on my screen. I'm not sure if  
23 Mr. Branden or Mr. Garcia can see you. Frankly, as long as  
24 Mr. Garcia can, it's no issue if I can't.

25 THE DEFENDANT: I cannot see him.

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1 MR. BRANDEN: I can't either.

2 THE COURT: Let me try to reconnect.

3 MR. BRANDEN: We can see you now, Judge.

4 THE COURT: Mr. Garcia, can you see me?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. OK. I'm now going to put you  
7 under oath, Mr. Garcia, and then I'm going to ask you a bunch  
8 of questions. I put you under oath and that means you have to  
9 answer truthfully. If you intentionally say something not  
10 true, you can be prosecuted for perjury because you are under  
11 oath.

12 If you could please raise your right hand.

13 (Defendant sworn)

14 THE COURT: Can you tell me your full name, please.

15 THE DEFENDANT: Davonte Garcia.

16 THE COURT: And how old are you, Mr. Garcia?

17 THE DEFENDANT: I'm 23 years old.

18 THE COURT: And how far did you go in school?

19 THE DEFENDANT: Eleventh grade.

20 THE COURT: And where was that?

21 THE DEFENDANT: The Bronx, New York, DeWitt Clinton  
22 High School.

23 THE COURT: DeWitt Clinton.

24 THE DEFENDANT: Yes.

25 THE COURT: Have you ever been treated or hospitalized

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1 for any mental illness?

2 THE DEFENDANT: No.

3 THE COURT: And are you now or have you recently been  
4 under the care of a psychiatrist or a doctor?

5 THE DEFENDANT: I have been seeing a psychiatrist here  
6 and there.

7 THE COURT: OK. Are you taking any medications?

8 THE DEFENDANT: No.

9 THE COURT: All right. And have you ever been treated  
10 or hospitalized for addiction to drugs or alcohol?

11 THE DEFENDANT: No.

12 THE COURT: And in the past 24 hours have you had any  
13 drugs or medicine or pills or alcohol?

14 THE DEFENDANT: No.

15 THE COURT: And do you understand what is happening in  
16 this proceeding today?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Does either counsel have any  
19 doubt as to defendant's competence to plead? Mr. Branden?

20 MR. BRANDEN: I do not.

21 THE COURT: And Mr. Balsamello?

22 THE DEFENDANT: No.

23 THE COURT: Based on his responses to my questions and  
24 his demeanor as I observe it from his responses, as well as his  
25 appearance as I see it on the video, I find that the defendant



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1 does appear to be competent to enter a plea of guilty, and I  
2 make that finding.

3 Mr. Garcia, have you had a sufficient opportunity to  
4 discuss your case with your lawyer, including the charge you  
5 intend to plead guilty to, any possible defenses and the  
6 consequences of pleading guilty?

7 THE DEFENDANT: Yes, I have.

8 THE COURT: And are you satisfied with his  
9 representation of you?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: All right. I am now going to explain  
12 certain constitutional rights that you have. You give up  
13 certain rights when you plead guilty, so I just want to make  
14 sure you understand those rights.

15 Under the Constitution and laws of the United States,  
16 you have the right to a public trial, a speedy trial by a jury  
17 on the charges in the indictment. At the trial you would be  
18 presumed innocent and the government would have to prove you  
19 guilty beyond a reasonable doubt before you could be convicted.

20 You would not have the burden of proving your  
21 innocence. A jury of 12 people, all 12 of them would have to  
22 agree that you are guilty beyond a reasonable doubt. Do you  
23 understand all that?

24 THE DEFENDANT: Yes.

25 THE COURT: At that trial and at every stage of your

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1 case you would have the right to be represented by an attorney,  
2 and if you couldn't afford one, one would be appointed to  
3 represent you.

4 During a trial, the witnesses for the government would  
5 have to come to court and testify in your presence, and your  
6 lawyer would be able to cross-examine the government's  
7 witnesses, object to the government's evidence, and issue  
8 subpoenas and offer evidence and compel witnesses to testify in  
9 your defense. Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: At a trial, although you would have the  
12 right to testify if you chose to, you would also have the right  
13 not to testify, and no suggestion or inference of guilt could  
14 be drawn from the fact that you did not testify if that is what  
15 you chose. Do you understand that?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: Also, if you were convicted at a trial,  
18 you would have the right to appeal that verdict to the Court of  
19 Appeals. Do you understand?

20 THE DEFENDANT: Yes.

21 THE COURT: And even at this time as you are entering  
22 this plea, is it your intention to plea not guilty and then  
23 there would be no trial on these charges? Do you understand  
24 that?

25 THE DEFENDANT: Yes.

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1 THE COURT: And if you do plead guilty and I accept  
2 your plea, you will be giving up your right to the trial and  
3 the other rights I just described. There will be no trial, but  
4 I will enter judgment of guilty on the one count that you are  
5 pleading guilty to, and then I will sentence you later in a  
6 couple of months after receiving certain information, including  
7 the presentence report and any written submissions from your  
8 lawyer and the government before deciding on the sentence. Do  
9 you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: And if you plead guilty, you will also  
12 have to give up your right not to incriminate yourself, because  
13 you will ask you about what you did so that I can be satisfied  
14 that you are actually guilty and not pleading guilty for some  
15 other reason. Do you understand?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: All right. Under this plea agreement --  
18 of which I have a copy with the cover date of July 13 -- you  
19 are agreeing to plead guilty to Count 18 and specifically a  
20 lesser included offense involving a lower drug quantity.

21 And I'd like to ask Mr. Balsamello if you would please  
22 state the elements of that offense.

23 MR. BALSAMELLO: Yes, your Honor. If the case were to  
24 proceed to trial, the government would have to prove beyond a  
25 reasonable doubt, first, that there was an agreement among two

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1 or more people to violate the narcotics laws by distributing,  
2 or possessing with intent to distribute at least 28 grams of  
3 mixtures and substances containing cocaine base, commonly  
4 referred to as crack cocaine; and, second, that the defendant  
5 entered into that agreement knowingly and with the intent to  
6 further its objectives.

7 We would also have to show by a preponderance of the  
8 evidence that there was venue in the Southern District of New  
9 York, meaning that some portion of the crime occurred here in  
10 this District.

11 THE COURT: Thank you. I also want to explain the  
12 penalty under the law for this crime. There are two things.  
13 There is what is called a statute that has a minimum and a  
14 maximum, and I am basically limited to those minimum and  
15 maximum periods of imprisonment. But then there is the  
16 sentencing guidelines, which is something that is advisory.

17 So the statute, the first thing I want to explain what  
18 the maximum and minimum penalties are. There is a maximum of  
19 40 years' imprisonment for this crime with a mandatory minimum  
20 of five years' imprisonment. There is a maximum fine of the  
21 greatest of \$5 million, or twice the total gain from the  
22 offense or twice the total loss to others from the offense; and  
23 there is a \$100 special assessment.

24 There is also a term of supervised release for up to  
25 life, with a mandatory minimum of at least four years

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1 supervised release. And when I say supervised release, that's  
2 essentially like probation. It means after any period of  
3 imprisonment, you are subject to certain terms and conditions  
4 to comply with during that period, and if you don't comply with  
5 them, you can be returned to prison without a jury trial.

6 Also as part of the plea agreement you have to admit  
7 to the forfeiture allegation and agree to forfeit to the United  
8 States government any property derived from proceeds from this  
9 offense or used to facilitate this offense as explained in the  
10 plea agreement.

11 Are you a United States citizen?

12 THE DEFENDANT: Yes.

13 THE COURT: All right. Also, if your attorney or  
14 anyone has attempted to predict or promise you what your  
15 sentence will be, I want to explain that I am the one who is  
16 going to determine your sentence, so no one else can guarantee  
17 you what your sentence is going to be. I'm going to wait until  
18 I receive the presentence report and any other written  
19 submissions and then consider the sentencing guidelines, any  
20 departures or variances, and ultimately what an appropriate  
21 sentence is for you. So, no one else can promise you what your  
22 sentence is going to be. And if I impose a sentence that's not  
23 what you had expected or what someone has told you, you will  
24 still be bound by this guilty plea on this count; do you  
25 understand that?

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1 THE DEFENDANT: Yes.

2 THE COURT: Has anyone tried to force you to plead  
3 guilty or threaten you?

4 THE DEFENDANT: No, no.

5 THE COURT: OK. And I mentioned the plea agreement.  
6 It's the July 13th plea agreement that I have signatures on to  
7 this count of the S3 indictment. Did you have a chance to read  
8 this agreement in full and go over it with your lawyer?

9 THE DEFENDANT: Yes, I have.

10 THE COURT: And do you feel you understand everything  
11 that's in the plea agreement?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: All right. Do you have any agreement or  
14 understanding with the government that's been left out of this  
15 agreement?

16 THE DEFENDANT: No, your Honor.

17 THE COURT: All right. Under the plea agreement there  
18 is an agreed-upon sentencing guideline range. As I said, the  
19 sentencing guidelines are advisory; I need to consider them but  
20 they're not binding, although I am bound by that five year  
21 mandatory minimum. But the sentencing range that's in this  
22 agreement is 70 months' to 87 months' imprisonment. That is  
23 binding on you and the government, but it's not binding on me.  
24 I will make my own sentencing guideline calculation, although I  
25 have no reason to think that's not the right sentencing

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1 guideline calculation.

2 Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: And one thing I want to make sure you  
5 understand is that you are giving up your right to appeal or  
6 challenge your sentence as long as I sentence you within or  
7 below that range, that is, to 87 months or less. Do you  
8 understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: And do you still wish to plead guilty?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: And are you doing so voluntarily and of  
13 your own free will?

14 THE DEFENDANT: Yes.

15 THE COURT: All right. Would you please tell me in  
16 your own words what you did that makes you believe you are  
17 guilty of this charge.

18 THE DEFENDANT: In 2018 I chose to sell crack cocaine  
19 with another in the Bronx area. I knew it was illegal.

20 THE COURT: You said you agreed with another to sell  
21 crack cocaine?

22 THE DEFENDANT: Yes, in the Bronx area.

23 THE COURT: When you did that --

24 MR. BALSAMELLO: I think he also said that he knew  
25 that was illegal.

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1 THE DEFENDANT: Yes, I did, I knew it was illegal.

2 THE COURT: OK, thank you. Mr. Balsamello, do you  
3 believe that's sufficient for the plea, or do you believe there  
4 is any other questioning that would be appropriate?

5 MR. BALSAMELLO: I would just ask for confirmation  
6 that the agreement contemplated at least 28 grams of crack  
7 cocaine.

8 THE DEFENDANT: Yes.

9 THE COURT: OK. It did involve at least 28 grams of  
10 crack cocaine, Mr. Garcia?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: All right.?

13 MR. BRANDEN: Judge, if I may interrupt also. I just  
14 want to note that I met with Mr. Garcia before this change of  
15 plea hearing. He authorized me to sign his name on the last  
16 page of the July 13th plea agreement. I did so, and I sent it  
17 to the court.

18 THE COURT: OK. Thank you. Yes, I did just receive  
19 that, and I should go over that briefly.

20 There is a plea agreement that has a signature line  
21 for you, Mr. Garcia, as well as your lawyer, as well as the  
22 government's lawyer, and what that reflects is it's a binding  
23 agreement. You are agreeing to it? Do you authorize your  
24 lawyer Mr. Branden to sign for you that agreement?

25 THE DEFENDANT: Yes, I do.



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1 THE COURT: OK. And by doing that, you are agreeing  
2 to be bound by that agreement; is that right?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. Thank you. Mr. Balsamello, do  
5 you believe there is sufficient factual predicate for the plea  
6 at this point?

7 MR. BALSAMELLO: Yes, I do.

8 THE COURT: And you as well, Mr. Branden?

9 MR. BRANDEN: I do, Judge, yes.

10 THE COURT: And you don't know of any other reason why  
11 I should not accept your client's guilty plea?

12 MR. BRANDEN: No, I believe you should accept it.

13 THE COURT: All right. Mr. Garcia, since you  
14 acknowledge that you are in fact guilty as charged, and since  
15 I'm satisfied that you know your rights, including your right  
16 to go to trial, and that you are aware of the consequences of  
17 your plea, including the sentence which may be imposed, I do  
18 find that you are voluntarily pleading guilty, and I accept  
19 your guilty plea and enter judgment on Count 18, specifically  
20 the lesser included offense of conspiracy to distribute and  
21 possess with intent to distribute 28 grams of mixtures and  
22 substances containing cocaine base.

23 Now, the next --

24 MR. BALSAMELLO: Your Honor, I apologize, your Honor.

25 THE COURT: Go ahead.

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1 MR. BALSAMELLO: I apologize, Judge. There is one  
2 other topic related to the factual basis of the plea. If you  
3 can just allocute Mr. Garcia. The appellate waiver also  
4 contemplates that he cannot appeal any lawful term of  
5 supervised release or forfeiture. I just want to make sure --  
6 fine or forfeiture. I just want to make sure that's addressed.

7 THE COURT: OK. So when I said you're giving up your  
8 right to appeal, Mr. Garcia, if I sentence you within or below  
9 the guideline range, that also applies to any forfeiture, any  
10 supervised release period like the probation after  
11 incarceration period, and any fine that's lawful within the  
12 ranges I discussed. Do you understand you're giving up your  
13 right to appeal any of those, as long as they are lawful as  
14 imposed by me?

15 THE DEFENDANT: Yes.

16 THE COURT: All right. Anything further?

17 MR. BALSAMELLO: No, Judge. Thank you.

18 THE COURT: OK.

19 As I said, I do accept your plea and enter judgment of  
20 guilty on the count that I mentioned.

21 The next step in the process is sentencing. I will  
22 set a date for sentencing now, and you will have a chance I  
23 assume by phone to have a meeting both with your lawyer and  
24 with the probation officer who is preparing the presentence  
25 report.

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1           Now, the normal time for sentencing is about 100 days  
2 out, which would put us in early December. Is there any issue  
3 with putting sentencing on Thursday, December 10?

4           MR. BRANDEN: I don't have my book in front of me,  
5 Judge, but I don't believe that's a problem. If it is, I will  
6 write the court.

7           THE COURT: OK. Is that OK with the government?

8           MR. BALSAMELLO: It is, your Honor.

9           THE COURT: All right. Sentencing is set for  
10 Thursday, December 10 at 12 noon. And defense submissions will  
11 be due December 1 and government submissions due December 7.  
12 That's a little less than the usual two weeks and one week out  
13 because of the Thanksgiving holidays, but that's fine for me,  
14 December 1 and December 7 for written submissions.

15          Anything further from the government?

16          MR. BALSAMELLO: No, your Honor. I will just note for  
17 the record that we have spoken to Mr. Branden about actually  
18 mailing us an original copy of the signature page on the  
19 agreement, so we will keep that in our records as if this had  
20 been an in-person plea and we had the paper with us. Nothing  
21 further from the government.

22          THE COURT: All right. Anything further from the  
23 defense? Mr. Branden?

24          MR. BRANDEN: Judge, just one quick note. I know  
25 given the defendant has pled guilty to a (b)(1)(B) drug

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1 offense, that even if he were at liberty at the moment -- which  
2 he is clearly not -- he would likely be remanded, but I may be  
3 making a bail application in the next few days. If I do so, I  
4 will do that by writing. And I have told Mr. Balsamello that I  
5 was planning on doing that. I just have to check with  
6 Mr. Garcia's -- certain family member of his before I put pen  
7 to paper.

8 THE COURT: OK. Thanks for letting me know. All  
9 right. Thank you, everyone. This court is adjourned.

10 (Adjourned)